U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 March 2004

BALCA Case No.: 2003-INA-16
ETA Case No.: P2000-CA-09507611/ML

In the Matter of:

THE CORPORATE HOUSING GROUP, INC.,
Employer,

on behalf of

NAOMI MACHIDA,
Alien.

Appearance: James E. Peterson, President
Berkeley, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Naomi Machida ("the Alien") filed by The Corporate Housing Group, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A)("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On October 25, 1999, Employer, The Corporate Housing Group, Inc., filed an application for labor certification on behalf of the Alien, Naomi Machida, for the position of Administrative/Computer Marketing, which was classified by the Job Service as Administrative Assistant. The stated job requirements for the position were an Associates degree in general studies, two months of computer related training, one year of experience in the job offered or in the related occupations of marketing, computer operations, or accounting, the ability to type fifty-five w.p.m., proficiency in Japanese and the ability to operate a laptop computer. (AF 20).

In a Notice of Findings ("NOF") issued on June 7, 2002, the CO proposed to deny certification based on an insufficient recruitment effort, the unlawful rejection of qualified U.S. workers, the failure to offer minimum requirements and the unduly restrictive foreign language requirement. (AF 14-18).

Employer submitted its rebuttal on April 29, 2002. (AF 7-13). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated August 16, 2002, denying certification on the same bases. (AF 5-6). On September 17, 2002, Employer filed a Request for Review and the matter was docketed in this Office on October 29, 2002. (AF 1-4).

DISCUSSION

Although the CO cited multiple reasons for denying certification, for the purpose of rendering a decision herein, our focus is on the Japanese foreign language requirement. In the NOF, the CO stated that the requirement of Japanese was not normal for the position of administrative assistant and that there was no documentation of the need for this requirement. Employer was instructed to justify the requirement based on business necessity or to amend the requirement. (AF 16).

The rebuttal consisted of a statement by Employer's President, James E. Peterson, dated July 12, 2002. (AF 7-10). Mr. Peterson stated that Japan was building a large number of American-style houses and Employer noted the trend as a market for its services. As such, Employer indicated that an employee with Japanese language skills was essential. (AF 8). The CO, in the FD, found that the requirement was not justified by any documentation; Employer's statement that there was a trend in the Japanese housing market was insufficient to justify the Japanese requirement. (AF 6).

Twenty C.F.R. § 656.21(b)(2)(i)(C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. To establish the business necessity of a foreign language requirement, an employer must show that: (1) the requirement bears a reasonable relationship in the context of employer's business and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *See Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*); *Coker's Pedigreed Seed Co.*, 1988-INA-48 (Apr. 19, 1989) (*en banc*).

In the NOF, the CO directed Employer to document the business necessity for its Japanese language requirement. However, Employer did not document any current need for the requirement. Employer did not show that a significant number and/or percentage of its clients could not communicate in English, did not demonstrate that a significant percentage of its existing business is dependent upon the Japanese language and did not show how the absence of the language would have an adverse impact on its present business. Instead, Employer provided a cursory statement regarding an "upward trend" in the Japanese housing market and suggested that fluency in the Japanese language would facilitate an expansion of its business. (AF 8).

Accordingly, Employer does not contend that the Japanese language requirement is based upon its existing business, but rather that it is necessary based on possible expansion into foreign markets. Because of the potential for abuse, one must apply strict

scrutiny to documentation presented in cases involving foreign language requirements that are purportedly based on proposed plans for expansion into foreign markets. *See, e.g., Growing Expectations, Inc.,* 1995-INA-425 (July 2, 1997); *Creative Fine Arts, Inc.*, 1994-INA-27 (Apr. 25, 1995); *Advanced Digital Corporation*, 1990-INA-137 (May 21, 1991). An employer must establish that it has a definite expansion plan and must show how the foreign language requirement arises from business necessity. *Cable Car Photo and Electronics*, 1990-INA-141 (June 5, 1991).

In the present case, we find that Employer's vague and self-serving statement regarding market trends fails to adequately document the business necessity for the Japanese language requirement. Employer has provided no documentation regarding the indicated trend or how this trend created an opportunity for expansion. Employer has not demonstrated that it has a definite expansion plan, but has merely asserted that there could be a potential for growth in a certain market. Furthermore, Employer has not documented why an administrative assistant who speaks Japanese would be necessary for its operations. Without any such documentation, Employer cannot show business necessity for the Japanese language requirement. In view of the foregoing, we find that labor certification was properly denied.[1]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

[1] In light of our finding regarding the foreign language requirement, we choose not to address the multiple other grounds for denying labor certification cited by the CO in the NOF and FD.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.